

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



June 24, 2003

Agenda ID #2391
Ratesetting

TO: PARTIES OF RECORD IN APPLICATION 03-05-039 AND
PETITION 03-05-040

This is the draft decision of Administrative Law Judge (ALJ) Walker. It will not appear on the Commission's agenda for at least 12 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(f)(9), comments on the draft decision must be filed within 13 days of its mailing and no reply comments will be accepted.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Walker at gew@cpuc.ca.gov. Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:k47

Attachment

Decision **DRAFT DECISION OF ALJ WALKER** (Mailed 6/24/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application for Ex Parte Approval of an Interim
Alternative Plan for Protection of the Public
Pursuant to General Order 120-C, Sections 3(E)
and 6.

Application 03-05-039
(Filed May 30, 2003)

Petition to Adopt, Amend, or Repeal a Regulation
Pursuant to Public Utilities Code Section 1708.5.

Petition 03-05-040
(Filed May 30, 2003)

**INTERIM DECISION GRANTING RELIEF TO MANNED BALLOON
OPERATORS PENDING FULL HEARINGS ON THE ISSUES****1. Summary**

In these two proceedings, representatives of California's hot air balloon operators (Petitioners) seek expedited action by the California Public Utilities Commission (Commission) for relief from certain insurance requirements of General Order (GO) 120-C that are applicable to commercial manned balloon operations. Petitioners state that insurance for providers of hot air balloon rides to the public is all but impossible to obtain in a manner that meets all current requirements of GO 120-C, and that this threatens the continued operation of this tourist-oriented industry. This Interim Decision adopts an Interim Plan applicable to GO 120-C to provide the relief requested pending full hearings as necessary on whether amendments to GO 120-C are required.

2. Procedural History

Petitioners filed these two proceedings on May 30, 2003. Application (A.) 03-05-039, which we address today, seeks approval of an Interim Plan interpreting GO 120-C to enable hot air balloon providers to obtain required insurance without sacrifice to the public safety. Petition (P.) 03-05-040 seeks a permanent amendment to GO 120-C following hearings and briefings by the parties.

The assigned Administrative Law Judge (ALJ) on June 10, 2003, issued a ruling addressing procedural requirements of the two proceedings. Specifically, the ruling (1) granted Petitioners' request to shorten time for filing of protests to 10 days from the date of ruling; (2) adopted Petitioners' proposed Service List for these proceedings (comprised of 75 entities, including balloon operators, insurers, various district attorney offices, the Federal Aviation Administration (FAA), and several state officials); (3) directed Petitioners to serve a copy of A.03-05-039 and P.03-05-040 on cities and counties in which the Petitioners operate, and (4) shortened time to 7 days for protests by cities and counties.

3. Background

Commercial hot air ballooning was a relatively small industry in California until the 1980s, when it began expanding to serve customer demand. Petitioners state that today approximately 50 companies offer balloon rides throughout California. The operations are concentrated in popular tourist regions, including the Napa Valley, Sonoma Valley, Palm Springs, Temecula, and San Diego areas. Petitioners state that most of the commercial balloons are designed to carry more than 6 passengers, and the largest balloons can carry up to 16 passengers. Hot air balloons are certificated and regulated by the FAA. Airworthiness standards for manned balloons are set forth in 14 CFR Part 31, pilots and instructors must

be licensed under 14 CFR Part 61, and operating and flight rules are set forth in 14 CFR Part 91.

Under GO 120-C, this Commission requires manned balloon operators to carry passenger liability insurance of at least \$100,000 per passenger seat in aircraft with a seating capacity of 1 to 20 persons, along with aircraft property damage liability insurance of at least \$100,000 for each accident. Generally, the insurance must be provided by a company licensed to write insurance in California, although alternative methods of providing insurance protection are set forth in the GO 120-C, Section 3. Insurers are required to file a form, called a PE 794 form, with the Commission to ensure compliance.

According to Petitioners, insurance that complies with all of the requirements of GO 120-C has become impossible to obtain for virtually all of California's balloon operators. They state that since the events of September 11, 2001, the few insurance companies that did provide balloon insurance have either withdrawn from the California market or refuse to write policies that meet all of the requirements of GO 120-C. Unless relief is granted, Petitioners state that they face a Hobson's choice: either cease operations or purchase insurance from a company that does not meet all of the Commission's regulations and face enforcement action by the Commission.

Petitioners state that balloon insurance today is available through only one U.S. company, the IMC Agency (IMC) in Burnsville, Minnesota. However, IMC has a new underwriter, Tudor Insurance Company (Tudor), which limits its balloon coverage to that available in states other than California. Thus, Tudor limits maximum liability to \$1 million, which is less than the minimum requirement of GO 120-C for any balloon with more than 10 passengers. Moreover, Tudor will not sell insurance to any operator that owns more than one

balloon. This is because GO 120-C, Section 8, requires the insurance company to certify that all policies it may issue will apply to all commercial flights operated by the insured company whether or not a particular balloon is specifically mentioned in the policy.

Petitioners state that as existing insurance policies lapse and renewal is denied, the Commission staff has issued “cease and desist” letters to operators demanding that they obtain the specific insurance required by GO 120-C or cease operations. Petitioners state that at least one operator has been referred to a local district attorney who in turn has filed criminal charges against the operator for failure to comply with GO 120-C insurance requirements.

4. Relief Requested

Petitioners seek an alternative plan of protection, as permitted by GO 120-C, Sections 3(E) and 6. They note that such an alternative plan of protection must be approved via formal application to the Commission. The application in these proceedings seeks such approval. The application seeks adoption on an interim basis of an Interim Plan that would remain in place until the petition for a rule change in GO 120-C is completed. The application states:

Applicants only request approval of this Interim Plan on an interim basis, until a longer term solution for the ballooning industry can be addressed through a rulemaking proceeding that will amend General Order 120-C, as requested in the Petition filed contemporaneously with this Application.

In order to ensure that the public is protected to the fullest extent feasible, Applicants concur that only those balloon companies meeting the highest standards of professionalism and safety training may take advantage of the Interim Plan proposed by this Application.

The Interim Plan proposed by applicants would have the following requirements:

1. Each pilot shall have an FAA Commercial, Lighter-Than-Air Pilot Certificate with Balloon class rating.
2. Each pilot: (a) shall meet FAA requirements and demonstrate proficiency as Pilot-In-Command in Category and Class balloon to be flown in the passenger ride business; (b) shall attend a balloon safety seminar annually; (c) shall complete a biennial flight review in accordance with FAA regulations.
3. Each balloon used shall be FAA-certificated Standard and shall undergo FAA-mandated annual and/or 100-hour inspections from an FAA-certificated repair station.
4. All flight operations and passenger briefings shall be in full compliance with the regulations contained in 14 CFR Part 91 applicable to commercial hot air balloon operations.
5. Each balloon company must obtain and maintain insurance meeting the following minimum requirements: (a) the company issuing the policy shall be financially sound, with current net assets (as demonstrated by its most recent audited financial statements) of at least \$15,000,000; (b) if the insurance company is incorporated outside the United States, it (1) shall be regulated pursuant to the insurance laws of its country, and (2) the insurance broker or program manager for the underwriter shall operate in accordance with applicable laws and regulation of its jurisdiction; (3) the policy shall contain a minimum liability limit of \$1,000,000; (4) the company issuing insurance shall have re-insurance for any United States balloon program with a reinsurance company with a rating by the A.M. Best Company (Best) of at least B+, and a Best "Financial Size Category" of XL.

5. Public Interest

Petitioners state that the proposed Interim Plan both assures the public protection mandated by the Commission and the flexibility necessary to ensure that responsible balloon companies can continue to operate. They state that the Interim Plan will only be available to balloon companies that adhere to high safety standards.

According to Petitioners, statistics show that California balloon operators have safety records better than national averages. According to FAA records, there have been only 37 ballooning accidents in California since 1983. Since January 1, 2000, the National Transportation Safety Board reported only three accidents in all of California. Under the proposed Interim Plan, Petitioners state, safety is likely to improve even more, since only the most responsible operators will be permitted to operate legally.

The Interim Plan requires that only insurance companies meeting specified criteria may provide the necessary liability protection. Petitioners state that insurance companies meeting these criteria do exist, and will provide insurance to Petitioners.

For example, Petitioners state that a New Zealand company, Contractor's Bonding Limited (CBL), through the Schantz Agency and National Program Management, currently provides balloon insurance to about 30 percent of the balloons operated in the United States and is willing to write liability policies for California balloonists at the same levels it offers in the rest of the country. CBL is a financially secure company with \$19 million in current assets and has a financial strength equivalent to highly rated U.S. insurance carriers. Petitioners state that IMC also has indicated that it will be interested in selling liability insurance to California balloonists if GO 120-C requirements are amended. IMC's current underwriter, Tudor, is a financially secure company rated A+ Best and with a Best financial size category of VII, meaning that Tudor has between \$50 million and \$100 million in capital, surplus, and conditional reserves.

Accordingly, Petitioners state, if the Interim Plan is approved there are likely at least two, and perhaps more, financially sound insurers that will be offering liability insurance to California commercial balloonists.

6. Protests and Comments

The Commission on June 20, 2003 received a three-page letter commenting on the application and petition. We will treat the letter as a protest. In it, Robert C. Welker (Welker), a licensed insurance broker, states that he was able to offer hot air balloon insurance through underwriter General Star Indemnity until May 2002 and that he is negotiating now with another underwriter to offer balloon insurance in full compliance with GO 120-C. Welker alleges that there have been insurance violations by balloon operators and that the relief they seek is in fact “seeing GO 120-C vanish entirely at the public expense.” By contrast, however, the protest generally supports Petitioners’ claim that insurance meeting all of the requirements of GO 120-C is simply not available today for many operators.

Welker’s allegations of violations are conclusions without evidentiary support. We invite Welker and other parties to participate in the Prehearing Conference on the petition to amend GO 120-C and state the evidentiary showing they intend to make at formal hearing. Welker also is concerned with the potential elimination of the PE 794 filing. Our order today requires that, if a PE 794 filing cannot be made, an insurer or operator must file a statement of compliance and a copy of the insurance policy that meets the alternative requirements that we adopt today

7. Discussion

We believe that Petitioners have made a strong showing for our adoption of the interim relief sought here. As current insurance policies expire, more and more California balloonists are finding themselves without insurance that complies with all of the requirements of GO 120-C. In addition, we are now in the heart of the ballooning and tourist seasons in California. From May to

October, when the weather is usually ideal in the locations where most balloon companies operate, the operators generate about 70 percent of their annual revenues. With the cloud of the current insurance crisis hanging over them, balloon operators unable to obtain insurance may have to shut down, costing many people their full-time or seasonal employment. This in turn could have a ripple effect on the tourist economies in regions where Petitioners operate. Petitioners state that, for example, many visitors to the Napa Valley plan their trips around their balloon flight. Because balloon flights usually occur at sunrise, passengers usually stay in local hotels for at least one night and patronize local restaurants and other businesses. The Interim Plan proposed by Petitioners would be available only to responsible balloon operators that are in full compliance with FAA regulations, and it would provide a level of liability insurance coverage similar to that available in most other states.

We will adopt the Interim Plan as one that meets the “any other plan of protection for the public” permitted by GO 120-C, Section 3(E). We will provide that if an insurer is unable to file a PE 794 form as required by GO 120-C, either the insurer or the balloon operator will file in its place a statement of compliance with our order today, along with a copy of the insurance policy then in effect.

We emphasize that the relief accorded Petitioners is an interim measure that may change as we proceed with P.03-05-040, the petition to amend GO 120-C. We direct the assigned ALJ to promptly set a Prehearing Conference to determine whether hearings and briefs are required for full consideration of the proposed amendment of the General Order.

8. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the

Rules of Practice and Procedure. Pursuant to Rule 77.7(f)(9), the time for comments has been reduced to 13 days, and no reply comments will be accepted. We reduce the public review and comment period so that this proposed Interim Decision can be placed on the Commission's Agenda for July 10, 2003. Public necessity requires this approach because the public interest is served by resolving these issues on an interim basis before the hot air ballooning season ends. Comments were filed by _____

9. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

Findings of Fact

1. Petitioners seek expedited action by the Commission for relief from certain insurance requirements of GO 120-C applicable to commercial manner balloon operations.
2. Insurance for providers of hot air balloon rides to the public has become difficult if not impossible to obtain in a manner that meets all current requirements of GO 120-C.
3. Approximately 50 companies offer balloon rides throughout California, concentrated in popular tourist regions.
4. Most commercial balloons are designed to carry more than 6 passengers, and the largest can carry up to 16 passengers.
5. Hot air balloons are certificated and regulated by the FAA.
6. Under GO 120-C, manned balloon operators are required to carry passenger liability insurance of at least \$100,000 per passenger seat, along with aircraft property damage liability insurance of at least \$100,000 per accident.

7. Generally, insurance must be provided by a company licensed to write insurance in California.

8. GO 120-C, Section 3, provides that insurance protection may be provided by “any other plan of protection for the public approved” by the Commission.

9. Balloon insurance today is available only through one U.S. company, but that company limits maximum liability to \$1 million and limits coverage to an operator of only one balloon.

10. As existing policies lapse and renewal is denied, the Commission staff has issued “cease and desist” letters to operators.

11. Petitioners propose an Interim Plan of insurance coverage that would be approved by the Commission as satisfying the “any other plan” provision of GO 120-C, Section 3.

12. The Interim Plan would be available only to balloon operators in full compliance with FAA requirements and only through financially sound insurance companies.

13. The Interim Plan would permit balloon operators to obtain insurance from a New Zealand insurance company that now insures about 30 percent of balloon operators in the United States.

14. The Interim Plan is likely to permit balloon operators to obtain insurance from a U.S. company that limits maximum liability to \$1 million.

15. Failure to grant relief could result in the closing of manned balloon attractions, with corresponding harm to tourist attractions and local economies.

Conclusions of Law

1. Petitioners have made a strong showing for adoption of the interim relief sought here.

2. The Interim Plan proposed by Petitioners should be adopted on an interim basis pending full hearings as necessary on whether amendments to GO 120-C are necessary.

3. Time for comments should be shortened in order for this proposed Interim Decision to appear on the July 10 Agenda, so that these matters can be resolved on an interim basis before the hot air ballooning season ends.

INTERIM ORDER

IT IS ORDERED that:

1. The interim relief sought in Application (A.) 03-05-039 is granted.
2. The following Interim Plan proposed in A.03-05-039 shall be deemed to be a “plan of protection for the public approved as hereinafter required” pursuant to General Order (GO) 120-C, Section 3(E) and applicable to California operators of hot air balloon rides:
 - Each pilot shall have a Federal Aviation Administration (FAA) Commercial, Lighter-Than-Air Pilot Certificate with Balloon class rating.
 - Each pilot: (a) shall meet FAA requirements and demonstrate proficiency as Pilot-In-Command in Category and Class balloon to be flown in the passenger ride business; (b) Shall attend a balloon safety seminar annually; (c) Shall complete a biennial flight review in accordance with FAA regulations.
 - Each balloon used shall be FAA-certificated Standard and shall undergo FAA-mandated annual and/or 100-hour inspections from an FAA-certificated repair station.
 - All flight operations and passenger briefings shall be in full compliance with the regulations contained in 14 CFR Part 91 applicable to commercial hot air balloon operations.

- Each balloon company must obtain and maintain insurance meeting the following minimum requirements: (a) The company issuing the policy shall be financially sound, with current net assets (as demonstrated by its most recent audited financial statements) of at least \$15,000,000; (b) If the insurance company is incorporated outside the United States, it (1) shall be regulated pursuant to the insurance laws of its country, and (2) the insurance broker or program manager for the underwriter shall operate in accordance with applicable laws and regulation of its jurisdiction; (3) The policy shall contain a minimum liability limit of \$1,000,000; (4) The company issuing insurance shall have re-insurance for any United States balloon program with a reinsurance company with a rating by the A.M. Best Company (Best) of at least B+, and a Best “Financial Size Category” of XL.

3. If an insurer of hot air balloon liability is unable to file a PE 794 form as required by GO 120-C, either the insurer or the balloon operator will file in its place a statement of compliance with this Interim Order, along with a copy of the insurance policy then in effect.

4. The assigned Administrative Law Judge is directed to promptly set a Prehearing Conference in Petition (P.) 03-05-040 to determine whether hearings and briefs are required for full consideration of the proposed amendment of GO 120-C.

5. This Interim Order shall remain in effect until a final decision of the Commission in P.03-05-040.

6. Time for comments on this proposed Interim Decision is shortened to 13 days from the date of mailing of the proposed Interim Decision, with no reply comments.

7. Since this Interim Decision grants the relief requested by A.03-05-039, A.03-05-039 is closed.

8. P.03-05-040 remains open pending a final decision in this matter.

This order is effective today.

Dated _____, at San Francisco, California.